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Supreme Court, U.S.
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No. 99-64

In The

Supreme Court of the United States

ADVOCACY ORGANIZATION FOR PATIENTS AND PROVIDERS, a non-profit Michigan corporation, et al.,

Petitioners,

v.

AUTO CLUB INSURANCE ASSOCIATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

KATHLEEN MCCREE LEWIS
Counsel of Record
LORI M. SILSBURY
DYKEMA GOSSETT PLLC
On Behalf of Respondents
400 Renaissance Center
Detroit, Michigan 48243
(313) 568-6577

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

39 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether this Court should deny certiorari to the United States Court of Appeals for the Sixth Circuit where that Court's decision affirming the dismissal of Petitioners' RICO claim was based primarily on the unique provisions of Michigan's no-fault automobile insurance statute and therefore presents no important federal question?

2. Whether this Court should deny certiorari where the Sixth Circuit affirmed the dismissal of Petitioners' RICO claim for failure to plead a predicate act because it held that Respondents' actions were authorized by Michigan law and therefore could not form the basis of a fraud or extortion claim?

3. Whether this Court should deny certiorari where the Sixth Circuit properly held that even if a predicate act had been stated, Petitioners failed to state a claim under 18 U.S.C. § 1962(b) because they failed to allege that Respondents acquired or maintained an interest in or control of an enterprise through racketeering activity, or an injury to business or property by reason of a violation of the RICO act?

STATEMENT OF CORPORATE PARENTS AND PUBLICLY HELD COMPANIES HOLDING 10% OR MORE OF CORPORATE STOCK

ALLSTATE INSURANCE COMPANY
Parent: The Allstate Corporation

AUTO CLUB INSURANCE ASSOCIATION
Parent: None

AUTO OWNERS INSURANCE COMPANY
Parent: None

CITIZENS INSURANCE COMPANY OF AMERICA
Parent: Citizens Corporation

FARM BUREAU INSURANCE COMPANY
There is no such legal entity. It is believed plaintiffs are referring to either the Farm Bureau Mutual Insurance Company, which has no parent corporation, or Farm Bureau General, which is a wholly owned subsidiary of the Michigan Farm Bureau Financial Company, Inc.

FARMERS INSURANCE EXCHANGE
Parent: None

FRANKENMUTH MUTUAL INSURANCE COMPANY
Parent: None

LAHOUSSE-BARTLETT DISABILITY MANAGEMENT, INC.
d/b/a Review Works and Rehab Plans
Parent: None

MANAGEABILITY, INC.
Parent: None

MEDAUDIT SERVICES, INC.
Parent: None

STATEMENT OF CORPORATE PARENTS AND PUBLICLY HELD COMPANIES HOLDING 10% OR MORE OF CORPORATE STOCK – Continued

RECOVERY UNLIMITED
Parent: ZASU Group

SECURA MUTUAL INSURANCE COMPANY
Parent: None

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY
Parent: None

TRANSAMERICA INSURANCE GROUP
d/b/a TIG Insurance Corporation of America
Parent: None

TITAN INSURANCE COMPANY
Parent: St. Paul Companies

WOLVERINE MUTUAL INSURANCE COMPANY
Parent: None

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

STATEMENT OF CORPORATE PARENTS AND PUBLICLY HELD COMPANIES HOLDING 10% OR MORE OF CORPORATE STOCK ii

TABLE OF AUTHORITIES vi

RESPONDENTS' STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 2

I. PETITIONERS CANNOT ESTABLISH COMPELLING REASONS FOR GRANTING CERTIORARI 2

A. This Case Does Not Present Any Conflict Among The Federal Circuits 2

B. This Case Involves A Dispute Over The Interpretation Of Michigan's No-Fault Insurance Statute And Does Not Present Legal Issues Of National Importance 3

C. This Case Does Not Involve A Conflict With Controlling Supreme Court Precedents Or A Departure From The Accepted And Usual Course Of Judicial Proceedings 7

II. EACH OF PETITIONERS' ARGUMENTS ON THE MERITS WAS ANSWERED CORRECTLY BY THE LOWER COURT 7

A. The Lower Court Properly Dismissed Petitioners' RICO Counts For Failure To State A Predicate Act 8

ABLE OF CONTENTS – Continued

Page

1. Petitioners Did Not Establish Racketeering Activity Through The Predicate Act Of Mail/Wire Fraud 9

a. Michigan Law Requires An Insurance Carrier To Review Medical Bills To Determine If They Are Reasonable, And To Intercede On Behalf Of Its Insureds If The Medical Provider Attempts To Collect More Than A Reasonable Fee 10

b. Communications Regarding Disputes Over Contractual And Statutory Interpretations Do Not Form The Basis Of A Mail Or Wire Fraud Claim 15

c. The Sixth Circuit's Decision Is Further Supported By The Fact That Petitioners Failed To Plead Mail Fraud With Particularity 19

2. Petitioners Did Not Establish Racketeering Activity Through The Predicate Act Of Extortion 20

B. Petitioners Failed To Allege That Respondents Acquired Or Maintained An Interest In Or Control Of An Enterprise Through Racketeering Activity 24

C. Petitioners Did Not Show An Injury To Business Or Property "By Reason Of" A Violation Of § 1962(b) 25

CONCLUSION 27

TABLE OF AUTHORITIES

Page

CASES

Atlantic Gypsum Co. v. Lloyds Int'l Corp., 753 F. Supp. 505 (S.D.N.Y. 1990) 16

Blount Fin. Serv., Inc. v. Walter E. Heller & Co., 819 F.2d 151 (6th Cir. 1987) 16

Brownell v. State Farm Mut. Ins. Co., 757 F. Supp. 526 (E.D. Pa. 1991) 18

Chang v. Chen, 80 F.3d 1293 (9th Cir. 1996) 3

Compagnie de Reassurance D'Ile de France v. New England Reinsurance Corp., 57 F.3d 56 (1st Cir.), *cert. denied*, 516 U.S. 1109 (1995) 24, 26

Cook v. Wolverine Stockyards Co., 344 Mich. 207, 73 N.W.2d 902 (1955) 15

Dean v. Auto Club Ins. Ass'n, 139 Mich. App. 266, 362 N.W.2d 247 (1984) 13

DeLorean v. Cork Gully, 118 B.R. 932 (E.D. Mich. 1990) 26

DiLeo v. Ernst & Young, 901 F.2d 624 (7th Cir.), *cert. denied*, 489 U.S. 941 (1990) 19

Equal Employment Opportunity Comm. v. Federal Labor Relations Authority, 476 U.S. 19 (1986) 7

Gooden v. Transamerica Ins. Corp. of America, 166 Mich. App. 793, 420 N.W.2d 877, *appeal denied*, 431 Mich. 862 (1988) 14

Hofmann v. Auto Club Ins. Ass'n, 211 Mich. App. 55, 535 N.W.2d 529 (1995) 5

Hormel v. Helvering, 312 U.S. 552 (1941) 22

TABLE OF AUTHORITIES

Page

In re Tucker Freight Lines, Inc., 789 F. Supp. 884 (W.D. Mich. 1991) 24

Indenbaum v. Michigan Bd. of Medicine, 213 Mich. App. 263, 539 N.W.2d 574 (1995), *appeal denied*, 454 Mich. 880 (1997) 13

LaMothe v. Auto Club Ins. Ass'n, 214 Mich. App. 577, 543 N.W.2d 42 (1995), *appeal denied*, 453 Mich. 927 (1996) 5, 12, 14

Lightening Lube, Inc. v. Witco Corp., 4 F.3d 1153 (3d Cir. 1993) 24, 25

McGill v. Automobile Ass'n of Michigan, 207 Mich. App. 402, 526 N.W.2d 12 (1994) 5, 11, 12, 13, 14

Mercy Mt. Clemens Corp. v. Auto Club Ins. Ass'n, 219 Mich. App. 46, 555 N.W.2d 871 (1996) 5, 14

Moore v. Kayport Package Express, Inc., 885 F.2d 531 (9th Cir. 1989) 19

Munson Medical Ctr. v. Auto Club Ins. Ass'n, 218 Mich. App. 375, 554 N.W.2d 49, *appeal denied*, 453 Mich. 959 (1996) 5, 14

Nasser v. Auto Club Ins. Ass'n, 435 Mich. 33, 457 N.W.2d 637 (1990) 11, 13, 14

Palmer v. Nationwide Mut. Ins. Co., 945 F.2d 1371 (6th Cir. 1991) 15, 16, 18

People v. Fobb, 145 Mich. App. 786, 378 N.W.2d 600 (1985), *appeal denied*, 424 Mich. 878 (1986) 21

People v. Krist, 97 Mich. App. 669, 296 N.W.2d 139 (1980), *rev'd on other grounds*, 413 Mich. 937 (1982) 21

TABLE OF AUTHORITIES

Page

People v. Watson, 307 Mich. 378, 11 N.W.2d 926 (1943) 22, 23

Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co., 940 F. Supp. 1101 (W.D. Mich. 1996) 19

Semegen v. Weidner, 780 F.2d 727 (9th Cir. 1985) 19

Shavers v. Attorney General, 402 Mich. 554, 267 N.W.2d 72 (1978), *cert. denied*, 442 U.S. 934 (1979) 11

South Carolina Elec. & Gas Co. v. Westinghouse Elec. Corp., 826 F. Supp. 1549 (D.S.C. 1993) 24

Tebo v. Havlik, 418 Mich. 350, 343 N.W.2d 181 (1984) 13

Turner v. Schmidt Brewing Co., 278 Mich. 464, 270 N.W. 750 (1936) 15

Union Nat'l Bank of Little Rock v. Federal Nat'l Mortgage Ass'n, 860 F.2d 847 (8th Cir. 1988) 17

United States v. Qaoud, 777 F.2d 1105 (6th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986) 3

Various Markets, Inc. v. Chase Manhattan Bank, 908 F. Supp. 459 (E.D. Mich. 1995) 21

Vild v. Visconsi, 956 F.2d 560 (6th Cir.), *cert. denied*, 506 U.S. 832 (1992) 19

Whaley v. Auto Club Ins. Ass'n, 891 F. Supp. 1237 (E.D. Mich. 1995), *aff'd*, 129 F.3d 1266 (6th Cir. 1997) 17, 21, 26

TABLE OF AUTHORITIES

Page

STATUTES AND RULES

18 U.S.C. § 1961(l) 5

18 U.S.C. § 1962(b) 8, 18, 24, 25, 26

FED. R. CIV. P. 9(b) 19

MICH. COMP. LAWS § 500.3101 *et seq.*, MICH. STAT. ANN. § 24.13101 *et seq.* 4

MICH. COMP. LAWS § 500.3107(1)(A), MICH. STAT. ANN. § 24.13107(1)(A) 4, 10

MICH. COMP. LAWS § 500.3157, MICH. STAT. ANN. § 24.13157 ..... 4, 10

MICH. COMP. LAWS § 500.3355(c), MICH. STAT. ANN. § 24.13355 18

MICH. COMP. LAWS § 750.213, MICH. STAT. ANN. § 28.410 ..... 20, 21, 22

Supreme Court Rule 10 ..... 2, 3

OTHER AUTHORITY

Michigan Commissioner of Insurance, Interpretive Statement, Bulletin 92-03 23

RESPONDENTS' STATEMENT OF THE CASE

Petitioners' Complaint purports to assert a variety of state and federal law claims on behalf of three groups of plaintiffs. Petitioners include (a) forty-nine doctors who have provided medical care to injured patients who were insured under Michigan "no-fault" automobile policies, (b) two guardians of minors who were injured in an automobile accident and were covered by a no-fault automobile insurance policy, and (c) the Advocacy Organization for Patients and Providers ("AOPP"), a "spokesperson" for such providers and patients. Respondents are either insurers providing no-fault automobile insurance coverage for injuries suffered by their insureds in motor vehicle accidents, or entities which, for some of the insurers, reviewed billings of health care providers with respect to the necessity and reasonableness of the medical services provided and costs charged to the insureds. (Complaint, ¶¶ 1-6.)

Petitioners' "Statement of the Case" accurately recites the procedural history of the case. In violation of Supreme Court Rule 24(g), however, Petitioners' Statement contains legal arguments regarding whether the decisions of the District Court and the Sixth Circuit Court of Appeals were proper under the law. Those legal arguments, which generally misstate the legal issues presented by this case, are addressed *infra* in the Argument section.

SUMMARY OF ARGUMENT

This Court should deny a writ of certiorari for several reasons. First, Petitioners cannot demonstrate a "compelling reason" for review. Petitioners do not even attempt to articulate how any of the principal considerations for granting review, as expressed in Supreme Court Rule 10, are satisfied. In fact, the considerations cannot be met because: (1) this case does not present any conflict among the federal circuits; (2) this case primarily involves a dispute over the interpretation of a Michigan statute and there are no exceptional issues warranting further review by this Court; and (3) there is no conflict with prior Supreme Court precedent or a departure from the usual course of judicial proceedings.

Second, review by this Court is unnecessary because each of Petitioners' arguments on the merits was answered correctly by the lower courts.

ARGUMENT

I. PETITIONERS CANNOT ESTABLISH COMPELLING REASONS FOR GRANTING CERTIORARI.

A. This Case Does Not Present Any Conflict Among The Federal Circuits.

The Supreme Court should not accept this case for review because the lower court's decision does not conflict with decisions of other United States Courts of Appeals. The only issue identified in Petitioners' argument as a *potential* conflict among the circuits is whether Petitioners were required to allege that there was an

ascertainable structure separate and apart from the pattern of racketeering activity engaged in by Respondents in order properly to allege a claim under the Federal Racketeer Influenced and Corrupt Organizations Act ("RICO"). (Pet. App. p. 7, *citing Chang v. Chen*, 80 F.3d 1293 (9th Cir. 1996); *United States v. Qaoud*, 777 F.2d 1105 (6th Cir. 1985), *cert. denied*, 475 U.S. 1098 (1986)). The Sixth Circuit specifically declined to address this issue, however, and dismissed the case based upon Petitioners' failure to plead adequately other necessary RICO elements, a point which Petitioners concede in their Petition. (Pet. App., p. 30a, fn 10, and Pet. App. at p. 7 ("the Sixth Circuit avoided ruling on an issue which has not yet been resolved by this Court.")). Because the Sixth Circuit did not base its decision on the only legal issue on which Petitioners claim there is a potential split among the circuits, this case is an inappropriate vehicle for resolving that issue.

B. This Case Involves A Dispute Over The Interpretation Of Michigan's No-Fault Insurance Statute And Does Not Present Legal Issues Of National Importance.

The only time Petitioners reference anything close to the provisions of Supreme Court Rule 10 is at page 6 of their Petition, where they claim that this case presents an important federal issue of "whether RICO can be applied to the manner in which insurance companies (and their counterpart, medical expense review companies) fulfill their obligation to pay medical expenses on behalf of insured auto accident victims under state no-fault law." (Pet. App. p. 6.) This statement essentially concedes that

the issue is not an important federal law issue, but rather one of concern only to the citizens of the State of Michigan, as the dispute centers on the parties' rights and obligations under Michigan's no-fault law. Rather than establishing a precedent of nationwide significance, the Sixth Circuit's decision has no impact beyond Michigan.

Because Petitioners' primary claim is that Respondents committed a "predicate act" of fraud by misrepresenting the provisions of Michigan law to medical providers and to insured patients, the bulk of the Sixth Circuit's decision is, by necessity, devoted to an analysis of the proper interpretation of Michigan's Automobile No-Fault Insurance Act, MICH. COMP. LAWS § 500.3101 *et seq*, MICH. STAT. ANN. § 24.13101 *et seq*. (the "No-Fault Act"). The Michigan No-Fault Act is unique, and the Sixth Circuit carefully circumscribed its decision based on the particular circumstances of this case. As a consequence, it would make very little difference to the development of federal RICO law if this Court were to decide this case. Even if the Sixth Circuit improperly interpreted Michigan law in concluding that no predicate act of fraud was alleged, that alleged error is of no significance to either the federal RICO statutory scheme or to cases faced by federal courts in jurisdictions other than Michigan interpreting the RICO statute.

The extent to which the Sixth Circuit's decision is tied to the unique provisions of Michigan law is evident upon even a cursory review of the opinion. The Court began its opinion with an extensive review of the key statutory provisions underlying Michigan's mandatory No-Fault Act, Sections 3107 and 3157. (Pet. App. pp. 6a-8a.) The Court continued its analysis with a review of

the numerous decisions of the Michigan courts which have held that no-fault insurers provide an important "medical cost-policing function" in the no-fault statutory scheme, and that a medical provider's charges are limited by statute to amounts which are both "customary" and "reasonable." (Pet. App. pp. 8a-9a, citing *McGill v. Automobile Ass'n of Michigan*, 207 Mich. App. 402, 407-408, 526 N.W.2d 12 (1994); *Hofmann v. Auto Club Ins. Ass'n*, 211 Mich. App. 55, 535 N.W.2d 529 (1995); *LaMothe v. Auto Club Ins. Ass'n*, 214 Mich. App. 577, 543 N.W.2d 42 (1995), *appeal denied*, 453 Mich. 930, 554 N.W.2d 916 (1996); *Munson Med. Ctr. v. Auto Club Ins. Ass'n*, 218 Mich. App. 375, 554 N.W.2d 49, *appeal denied*, 453 Mich. 959, 564 N.W.2d 887 (1996), and *Mercy Mt. Clemens Corp. v. Auto Club Ins. Ass'n*, 219 Mich. App. 46, 555 N.W. 2d 871 (1996), *appeal denied*, 569 N.W. 2d 168 (1997).) The Sixth Circuit properly concluded that no fraud claim was alleged because Respondents' interpretation of the Michigan statute was correct, and the providers could not state a claim for fraud merely by asserting that they had not been paid the amount which they contended was "customary" or "reasonable." (Pet. App. pp. 12a-19a.)

Similarly, the Sixth Circuit's analysis of whether the predicate act of extortion was pled was based on Michigan's extortion statute, as required by the RICO act (*see* Section 1961(1) of RICO, providing that racketeering activity includes "any act or threat involving . . . extortion . . . which is chargeable under State law and punishable by imprisonment for more than one year."). (Pet.

App. pp. 19a-28a.)[1] As a result, even if this Court grants the Petition and decides this case, the decision will be based on the particular aspects of Michigan's No-Fault Act and Michigan's extortion statute, and thus will have no significance outside the State of Michigan.

Petitioners also attempt to interest the Court in this case by positing that the Sixth Circuit's decision may infringe on their constitutional right to charge amounts that the providers, in their sole judgment, determine are "customary" and "reasonable." (Pet. App. pp. 15-26.) This issue was not preserved by Petitioners for appeal, however, and would not be subject to review even if this Court were to grant the Petition. In their original Complaint, Petitioners asserted that Respondents' actions violated their due process rights under the Michigan and United States Constitutions. (Complaint, ¶ 139.) The District Court dismissed this count of the Complaint, holding that the dispute between the insurance companies and health care providers over what is a reasonable charge and over whether the providers could "balance bill" patients (for the difference between the amounts billed to insurers and paid by them) did not implicate state action for due process purposes. (Pet. App. pp. 46a-49a.) Petitioners did not appeal this dismissal to the Sixth Circuit, and thus waived their right to review of

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[1] The Sixth Circuit also properly held that Petitioners had waived their argument that Respondents had committed extortion by a "threat to accuse them of crimes," as this issue was not raised before the District Court and thus not preserved for appeal. (Pet. App. p. 21a.) Therefore, even if the writ is granted, this issue has not been preserved for appeal and would not be properly before this Court.

this issue even if the writ is granted. *See Equal Employment Opportunity Comm. v. Federal Labor Relations Authority*, 476 U.S. 19, 23 (1986) (Court's normal practice is to refrain from addressing issues not raised in the Court of Appeals).

C. This Case Does Not Involve A Conflict With Controlling Supreme Court Precedents Or A Departure From The Accepted And Usual Course Of Judicial Proceedings.

Other considerations governing review on certiorari include whether the lower court's decision conflicts with Supreme Court precedent or whether it departs from the accepted and usual course of judicial proceedings. Nowhere does the petition even suggest that this case involves a conflict with precedent or a departure from the usual course of proceedings. Because Petitioners have not shown (and cannot show) that there is a "compelling reason" for review, the petition should be denied.

II. EACH OF PETITIONERS' ARGUMENTS ON THE MERITS WAS ANSWERED CORRECTLY BY THE LOWER COURT.

The Sixth Circuit affirmed the dismissal of the RICO counts for failure to state a claim on three independent grounds. First, the Sixth Circuit affirmed that the Complaint failed properly to allege predicate acts constituting "racketeering activity," including the alleged predicate acts of mail/wire fraud and extortion. Second, the Sixth Circuit held that the Complaint failed to allege that Respondents had acquired or maintained an interest in or

control of an enterprise through racketeering activity, a required element of the claim missing completely from the Complaint. Third, the Sixth Circuit held that the Complaint failed to allege injury to business or property as a result of Respondents' having acquired an interest in or control of an enterprise through racketeering activity. The Sixth Circuit's affirmance of the dismissal of the RICO claims on these grounds was soundly reasoned and consistent with the holdings of courts which have addressed these legal issues.

A. The Lower Court Properly Dismissed Petitioners' RICO Counts For Failure To State A Predicate Act.

Petitioners' Complaint sought to allege a claim under section 1962(b) of RICO which provides:

> It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

18 U.S.C. § 1962(b). Petitioners admit that in order to state a RICO claim under this section, they must allege a predicate act of mail/wire fraud or extortion. (Pet. App., pp. 9-10.) The lower court correctly held that Petitioners failed to do either.

1. Petitioners Did Not Establish Racketeering Activity Through The Predicate Act Of Mail/Wire Fraud.

Petitioners contend that the insurance carriers committed fraud by selling no-fault insurance policies promising to pay all the insured's reasonable and necessary medical charges arising out of automobile accidents, and by stating to medical care providers that after the bills had been reviewed and discounted, the amount the insurers paid the providers was all the providers were entitled to receive under Michigan law. (Complaint, ¶¶ 168(a) and (d).) After a detailed review of the specific facts underlying these general allegations, the Sixth Circuit concluded that fraud had not been pled with particularity and that no fraud was stated as a matter of law. As the Court concluded:

> We think that where the law requires that the Defendants pay only the reasonable costs, but does not require reasonableness to be determined by some neutral party and contains no standards whatsoever for gauging what is reasonable, an allegation that the Defendants promised to pay the reasonable charge while intending to pay less than the reasonable charge cannot even state a claim for fraud as a matter of law.

(Pet. App. p. 36a.) This conclusion was proper.

a. Michigan Law Requires An Insurance Carrier To Review Medical Bills To Determine If They Are Reasonable, And To Intercede On Behalf Of Its Insureds If The Medical Provider Attempts To Collect More Than A Reasonable Fee.

Michigan law and public policy are clear that no-fault insurance carriers must review claims submitted to them and pay only reasonable rates for reasonably necessary services. The Sixth Circuit reached this conclusion based on the language of the key statutory provisions at issue in this case, § 3107 and § 3157 of the No-Fault Act, and on the case law interpreting those statutes. Section 3107 of the No-Fault Act provides that coverage includes "[a]llowable expenses consisting of all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." MICH. COMP. LAWS § 500.3107(1)(A), MICH. STAT. ANN. § 24.13107(1)(A). Section 3157 of the Act sets forth the amounts health care providers are permitted to charge for services performed for victims of automobile accidents, stating that the provider "may charge a reasonable amount for the products, services, and accommodations rendered. The charge shall not exceed the amount the person or institution customarily charges for like products, services and accommodations in cases not involving insurance." MICH. COMP. LAWS § 500.3157, MICH. STAT. ANN. § 24.13157. "Under this statutory scheme, an insurer is not *liable* for any medical expense to the extent that it is not a reasonable charge for a particular product

or service, or if the product or service itself is not reasonably necessary." *Nasser v. Auto Club Ins. Ass'n*, 435 Mich. 33, 49, 457 N.W.2d 637 (1990) (emphasis added by Court).

Although Michigan's No-Fault Act was enacted to provide an "innovative social and legal response to the long payment delays, inequitable payment structure, and high legal costs inherent in the tort (or "fault") liability system," *Shavers v. Attorney General*, 402 Mich. 554, 267 N.W.2d 72 (1978), *cert. denied*, 442 U.S. 934 (1979), of equal concern to the Michigan Legislature were the rising costs of health care and a desire to ensure that the no-fault insurance system did not increase costs of health care by removing incentives to medical care providers to minimize their charges when treating no-fault patients. The Michigan Court of Appeals summarized this concern as follows:

> It is to be recalled that the public policy of this state is that 'the existence of no-fault insurance shall not increase the cost of health care.' *Dean v. Auto Club Ins Ass'n*, 139 Mich. App. 266, 274; 362 NW2d 247 (1984). Indeed, '[t]he no-fault act was as concerned with the rising cost of health care as it was with providing an efficient system of automobile insurance.' *Id.* at 273. To that end, the plain and ordinary language of § 3107 requiring no-fault insurance carriers to pay no more than reasonable medical expenses, clearly evidences the Legislature's intent to 'place a check on health care providers who have "no incentive to keep the doctor bill at a minimum.' " *Dean, supra*, at 273.

McGill v. Automobile Ass'n of Michigan, supra, 207 Mich. App. at 407-408.

Michigan law is clear that no-fault insurers are required to serve a cost-policing function and that the only way they can fulfil their statutory obligation to pay only a reasonable charge for reasonably necessary services is to review substantively the providers' services and fees. In *McGill v. Auto Ass'n, supra,* at 408, the Michigan Court of Appeals summarized the obligation as follows:

> For the above reasons, we reject plaintiffs' argument that, pursuant to the no-fault act, defendants are obligated to pay the entire amount of plaintiffs' medical bills. Such an interpretation would require insurance companies to accept health care providers' unilateral decisions regarding what constituted medical expenses, effectively eliminating insurance companies' cost-policing function as contemplated by the no-fault act. This result would directly conflict with the Legislature's purpose in enacting the no-fault system in general and § 3107 in particular. '[I]t is clear that the Legislature did not intend for no-fault insurers to pay all the claims submitted without reviewing the claims for lack of coverage, excessiveness, or fraud.' *Lewis v. Aetna Casualty & Surety Co,* 109 Mich. App. 136; 311 NW2d 317 (1982).

Id.; see also LaMothe v. Auto Club Ins. Ass'n, supra, 214 Mich. App. at 582 (holding that an insurers' failure to perform such evaluations is a breach of the insurance policy and the No-Fault Act).

It is apparent from Petitioners' Complaint that they disagree with the interpretation of the No-Fault Act as applied by Respondents. They seek to have a court

declare the rights of parties under the statute, and essentially bless the practice by which provider Petitioners "balance-bill" their patients for amounts in excess of what the insurers believe to be reasonable and necessary. Petitioners' asserted basis for balance-billing is a purported implied contract, formed when a patient seeks treatment, to pay the provider whatever amount is charged. (*See, e.g.*, Complaint, ¶ 136.) Petitioners' interpretation essentially seeks to read a provision into the No-Fault Act that providers may charge a "reasonable amount for the products, services and accommodations rendered" to **insurers** – but may contract without limitation with no-fault **insureds** and charge whatever amount the provider sets. In Petitioners' ideal world, anyone who objected to such billing practices would be violating RICO. Petitioners' interpretation, however, is not supported by the plain language of the No-Fault Act or the context in which the No-Fault Act was adopted.[2] As the Michigan Supreme Court commented in *Nasser*:

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[2] Statutory language must be read in context. *Indenbaum v. Michigan Bd. of Medicine*, 213 Mich. App. 263, 272, 539 N.W.2d 574 (1995), *appeal denied*, 454 Mich. 880 (1997). As set forth *supra*, the intent of the No-Fault Act was to limit providers in the amounts they could charge patients receiving treatment pursuant to the Act so that the overall costs of health care were not increased. *Dean v. Auto Club Ins. Ass'n*, 139 Mich. App. 266, 274, 362 N.W.2d 247 (1984), *appeal denied*, 422 Mich. 921 (1985); *McGill*, 207 Mich. App. at 408. Restricting increased costs promotes the goal of the Act to provide an equitable and prompt method of redressing injuries in a way that makes mandatory insurance coverage affordable to all motorists. *Tebo v. Havlik*, 418 Mich. 350, 343 N.W.2d 181 (1984). "The basic goal of the no-fault insurance system is to provide individuals injured in motor

> We question, in any event, the Court of Appeals apparent conclusion that if the insurer is not made liable for even unreasonable and unnecessary expenses it will inevitably fall to plaintiff to pay those expenses. To the extent that plaintiff has any liability for these expenses in the event his insurance does not pay, it is presumably contractual. It seems unlikely that plaintiff would have an express agreement with [the doctor] or the hospital to pay unreasonable and unnecessary medical expenses, and equally as unlikely that he would have an implied contractual duty to do so. *See* 61 Am Jur 2d, Physicians, Surgeons, and Other Healers, § 158, pp 290-291. And, while we need not resolve the issue in this case, it seems unlikely that medical expenses found to be unreasonable or unnecessary in a no-fault action would be found recoverable in a contract action against plaintiff.

Nasser, 435 Mich. at 55-56, n. 10; *see also, McGill, supra*, 207 Mich. App. at 406; *Mercy Mt. Clemens Corp. v. Auto Club Ins. Ass'n, supra*, 219 Mich. App. at 51 ("Section 3157 of the act prohibits medical-care providers from charging more than a reasonable fee."); *LaMothe, supra*, 214 Mich. App. at 582, n. 3 ("the Legislature has decreed that a health care provider cannot lawfully charge more than a reasonable amount for . . . products, services, and accommodations."), *Munson Medical Ctr. v. Auto Club Ins. Ass'n, supra*, 218 Mich. App. at 378 (hospital is to be reimbursed

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vehicle accidents assured, adequate and prompt reparation for certain economic losses at the lowest cost to the individual and the system." *Gooden v. Transamerica Ins. Corp. of America*, 166 Mich. App. 793, 800, 420 N.W.2d 877, *appeal denied*, 431 Mich. 862 (1988).

by the insurer pursuant to the provisions of the Act). Michigan law generally will not enforce a contract that violates a statute or is otherwise illegal. *See, e.g., Turner v. Schmidt Brewing Co.*, 278 Mich. 464, 270 N.W. 750 (1936); *Cook v. Wolverine Stockyards Co.*, 344 Mich. 207, 209-210, 73 N.W.2d 902 (1955). In this case, the Michigan Legislature clearly has limited what a provider may recover (*i.e.*, a reasonable and customary rate); Petitioners cannot circumvent this mandate by dressing their unreasonable charges to the patients in the clothes of a purported "contract."

In light of this case law, the Sixth Circuit properly held that the fact that Respondents communicate with the medical providers and disputed their billings did not state a fraud claim under RICO. (Pet. App. pp. 17a-19a.)

b. Communications Regarding Disputes Over Contractual And Statutory Interpretations Do Not Form The Basis Of A Mail Or Wire Fraud Claim.

The Sixth Circuit's conclusion that the predicate act of mail/wire fraud was not pled was also correct given that Petitioners alleged nothing more than routine communications regarding business disputes or expressed differences of statutory interpretation. These acts do not constitute mail fraud. In *Palmer v. Nationwide Mut. Ins. Co.*, 945 F.2d 1371, 1374 (6th Cir. 1991), for example, the plaintiff alleged that Nationwide's failure to pay certain automobile accident-related disability claims constituted predicate acts of fraud. The District Court dismissed the

claims, denying leave to amend, and the Sixth Circuit affirmed, stating:

> The district court determined that 'any amendment of the RICO claim would be futile,' holding also that 'the vague predicate acts which Plaintiffs do allege could hardly be said to be a criminal activity at all.' *The district court referred to the correspondence and communications which plaintiffs characterized conclusively as mail and/or wire fraud as 'merely disputes over insurance benefits, nothing more, nothing less'* . . . [I]t is clear that plaintiffs have no basis for claiming predicate criminal acts under RICO arising from this controversy.

Id. at 1375 (citations omitted) (emphasis added). *See also, Atlantic Gypsum Co. v. Lloyds Int'l Corp.*, 753 F. Supp. 505, 513 (S.D.N.Y. 1990) (routine business letters showing dispute over employee's entitlement to benefits do not establish mail fraud for a RICO violation).

Like *Palmer*, this case can be characterized as a dispute over the adequacy of the payment of insurance benefits, *i.e.*, whether the insurers have fulfilled their obligation to pay all reasonably priced medical costs made necessary by an automobile accident. (*See* Complaint, at ¶ 168(a).) And, as in *Palmer*, Petitioners have no basis for claiming predicate criminal acts under RICO from this activity.

Similarly, in *Blount Fin. Serv., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151 (6th Cir. 1987), the plaintiff alleged that the defendant committed mail fraud by charging a rate of interest that was illegal under the parties' contract. In

affirming the trial court's dismissal of RICO from the complaint, the Sixth Circuit held:

> On the mail fraud RICO allegations, the complaint fails to state the nature of the fraud which gives rise to the predicate offense of mail fraud. *The fact that the parties take different positions under the contract as to the appropriate prime rate,* or the fact that the defendant charged too high a 'prime rate and thereby concealed or refused to disclose what the plaintiff considers the true 'prime rate' called for under the contract, *does not give rise to a valid claim for fraud* . . . Sending a financial statement which misconstrues the prime rate provided by the terms of the contract may breach the contract but it does not amount to a RICO mail fraud cause of action.

Id. at 152-53 (emphasis added). Thus, the fact that the parties here differ as to what constitutes reasonable medical charges under the no-fault policies issued by Respondents cannot be made the basis of a mail fraud claim. *See also, Union Nat'l Bank of Little Rock v. Federal Nat'l Mortgage Ass'n,* 860 F.2d 847, 857-858 (8th Cir. 1988) (holding that a genuine dispute regarding the proper interpretation of a contract acts as a bar to a RICO claim).

Like genuine contractual disputes, disputes regarding statutory interpretation cannot suffice as predicate acts of criminal fraud. *See Whaley v. Auto Club Ins. Ass'n,* 891 F. Supp. 1237, 1240 (E.D. Mich. 1995), *aff'd,* 129 F.3d 1266 (6th. Cir. 1997), where the plaintiffs claimed that the Auto Club's policy of denying commissions to its salaried sales force for placing auto insurance with the Michigan Automobile Insurance Placement Facility and instead

retaining the commissions for the company's coffers violated RICO. The sales agents contended that MICH. COMP. LAWS § 500.3355(c) required the payment of commissions directly to them. The Auto Club disagreed. The District Court dismissed the RICO claim on a number of grounds, including the absence of any predicate act, holding:

> Mailings and company policies based on a good faith dispute as to how a particular statute should be interpreted cannot constitute intentional or reckless misrepresentations sufficient for mail fraud nor are they sufficient to make out a claim for extortion.

891 F. Supp. at 1240.[3]

That Petitioners base their RICO claims on nothing more than a dispute concerning proper statutory interpretation is proved by the fact that they simultaneously are seeking a declaratory judgment concerning that very interpretation. (Complaint, pp. 58-60.) They affirmatively

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[3] Petitioners rely on *Brownell v. State Farm Mut. Ins. Co.*, 757 F. Supp. 526 (E.D. Pa. 1991) as the sole support for their claim and assert that the lower court's express rejection of *Brownell* was in error. (*See* Pet. App. 18a.) To the contrary, the lower court correctly declined to rely on the *Brownell* holding, which not only is contrary to *Palmer, supra*, where the Sixth Circuit held that disputes over the payment of benefits under an insurance contract do not constitute fraud, but also is inconsistent with the law applied by most circuits. *Brownell* is further distinguishable because plaintiffs there alleged a violation of § 1962(c), not § 1962(b) as Petitioners alleged here. This is an important difference because a § 1962(c) claim does not require the plaintiff to allege or prove injury from the maintenance or acquisition of an interest in an enterprise, while a § 1962(b) claim does require such a showing.

plead that there is no dispositive appellate decision in Michigan on the numerous issues on which they seek declaratory judgment. (Complaint, ¶ 129.) In sum, if Petitioners were permitted to bring a RICO claim because Respondents supposedly misinterpreted a statute or insurance policy and then failed to disclose that they misinterpreted it, every contract case would be a RICO case and every case based on statutory interpretation would be a RICO case. Petitioners were required to allege something more, but failed to do so.

c. The Sixth Circuit's Decision Is Further Supported By The Fact That Petitioners Failed To Plead Mail Fraud With Particularity.

Allegations of mail fraud must be made with the particularity required by FED. R. CIV. P. 9(b). *Vild v. Visconsi*, 956 F.2d 560, 561 (6th Cir.), *cert. denied*, 506 U.S. 832 (1992). Rule 9(b) requires that "all averments of fraud [and] the circumstances constituting fraud . . . shall be stated with particularity." Conclusory allegations have been universally recognized as insufficient to sustain a fraud claim. *See, e.g., Moore v. Kayport Package Express, Inc.*, 885 F.2d 531, 540 (9th Cir. 1989); *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985). To satisfy Rule 9(b), the plaintiff must allege the "who, what, when, where, and how" of the fraud. *DiLeo v. Ernst & Young*, 901 F.2d 624 (7th Cir.), *cert. denied*, 489 U.S. 941 (1990). Each defendant must be informed of his alleged participation in defrauding a plaintiff, and the complaint cannot lump all defendants together. *Picard Chemical Inc. Profit Sharing Plan v. Perrigo Co.*, 940 F. Supp. 1101, 1114 (W.D. Mich. 1996).

Petitioners' Complaint fails to withstand Rule 9(b) scrutiny for several reasons. First, Petitioners do not mention one defendant by name in their fraud claim and do not set forth the specific allegations of fraud against each defendant. (Complaint, at ¶¶ 157-63.) Petitioners do not state who made the alleged representations, what exactly was said, how they were made, when they were made or who received the representations. Nor do they identify the specific way in which plaintiffs relied on the representations. Similarly, the RICO counts contain generic statements and references to the exhibits, but fail to identify any specifics regarding alleged misrepresentations. As a result, the Sixth Circuit properly held that Petitioners failed properly to allege the predicate act of fraud, requiring the dismissal of their RICO claims. (Pet. App. pp. 18a-19a.)

2. Petitioners Did Not Establish Racketeering Activity Through The Predicate Act Of Extortion.

As an alternative predicate act in support of their RICO claim, Petitioners assert that the Respondent insurers committed extortion by threatening to sue the providers if the providers billed their patients for the alleged shortfall in the providers' reimbursement from the insurers. (*See, e.g.*, Complaint ¶ 119(b).) Petitioners rely on exhibits attached to their Complaint in which an insurer advised providers attempting to balance bill patients that the providers "may be violating the Michigan Collection Act." (Pet. App., p. 20). The Sixth Circuit held, however, that these assertions fail to allege extortion under MICH. COMP. LAWS § 750.213, MICH. STAT. ANN.

§ 28.410, a statute designed to plug loopholes in the common law crime of robbery.[4] This decision is correct for at least three reasons.

First, under Michigan law, a threat to commence civil litigation is not the type of threat that constitutes extortion. To constitute extortion, the threat must be: (a) to accuse the person threatened of a crime or offense, the truth of such accusation being immaterial; (b) to injure the person or property of the person threatened; or (c) to injure the mother, father, husband, wife or child of the person threatened. *People v. Fobb*, 145 Mich. App. 786, 790, 378 N.W.2d 600 (1985), *appeal denied*, 424 Mich. 878 (1986). Threatening to file a civil suit does not fit any of these categories. *See Various Markets, Inc. v. Chase Manhattan Bank*, 908 F. Supp. 459, 468 (E.D. Mich. 1995) ("statement of intention to file suit to enforce one's claimed legal rights is neither a threat nor the exercise of unlawful or wrongful coercion."). The same result is appropriate here.

Nor does a good faith dispute about compensation pursuant to a statute constitute the obtaining of property through the wrongful use of threatened violence. *Whaley v. Auto Club Ins. Ass'n, supra*, 891 F. Supp. at 1237.

Second, in an effort to save their RICO claim from dismissal, Petitioners argued for the first time to the Sixth Circuit that the insurers threatened the providers with criminal prosecution. The Sixth Circuit properly held that Petitioners were required to raise the issue at the trial court and, because they had failed to do so, that the

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[4] *See People v. Krist*, 97 Mich. App. 669, 675, 296 N.W.2d 139 (1980), *rev'd on other grounds*, 413 Mich. 937 (1982).

argument was waived. (Pet. App. 22a) (*relying on Hormel v. Helvering*, 312 U.S. 552, 556 (1941)).

The Sixth Circuit went on to determine, correctly, that even if Petitioners had not waived the argument, the exhibits they relied on for the proposition that the insurers threatened the providers with criminal prosecution cannot be "construed as threats to accuse the providers of crimes." (Pet. App. 22a). As the Sixth Circuit noted, the letters inform the providers only that their actions may be in violation of the law; they do not threaten prosecution or to report a crime. (Pet. App. 22a). Nor do the letters even state that the Michigan Collection Act *was* violated, they simply state that it *"may be"* violated. As such, there was no threat sufficient to state a claim for extortion under Michigan law, and therefore the letters could not form the basis of a RICO claim.

Finally, to be guilty of extortion under Michigan law, one must "maliciously threaten." MICH. COMP. LAWS § 750.213. Petitioners failed to allege any facts sufficient to raise an inference that Respondents acted with a malicious intent when they sent the letters at issue. An example of activity rising to the level of a "malicious threat" was found in *People v. Watson*, 307 Mich. 378, 11 N.W.2d 926 (1943), where, after receiving money from her male victim for an illegal abortion, the defendant continued to demand more money for treatment of medical complications she claimed had resulted from the abortion. When the victim told defendant he could not send any more payments, the defendant threatened "to air the whole thing," to tell her husband, and to involve an attorney. *Id.* at 927. In fact, the defendant had neither been pregnant

nor had an abortion, but had engaged in the scheme in an attempt to extort money from the victim. *Id.*

The Sixth Circuit accurately noted that, in contrast to the threat in *Watson*, Respondents' actions contained no such malicious intent. (Pet. App., p. 27a). This is especially true in light of the "Interpretive Statement" issued by Michigan's then-Commissioner of Insurance, David J. Dykhouse (which Petitioners attached to their Complaint). This Bulletin stated that insurers were required to provide insureds and claimants with complete protection from economic loss for benefits provided under personal protection insurance and that the insurers must act at all times to assure that the insured or claimant is not exposed to harassment, dunning, disparagement of credit, or lawsuits as a result of a dispute between the insurer and the health care provider. Interpretive Statement, Bulletin 92-03 at pp. 1-2. Moreover, the Bulletin stated that an insurer must act to protect insureds and claimants from any consequences of such a dispute. *Id.* The Commissioner further instructed the insurer, in cases where disputes do arise, to notify the provider (rather than the insured) that the insurer is responsible for paying any reasonable charges and also to warn health care providers that the insurer will defend the insured or claimant against any attempt at collection, and also may consider any other appropriate action to prevent the policyholder from being pursued for collection. *Id.* Thus, pursuant to these instructions, there could be no basis to Petitioners' allegation that the insurers acted with malice.

B. Petitioners Failed To Allege That Respondents Acquired Or Maintained An Interest In Or Control Of An Enterprise Through Racketeering Activity.

Even assuming, for the sake of argument, that Petitioners alleged a pattern of racketeering activity, the Sixth Circuit still acted properly by dismissing the RICO claim. A violation of § 1962(b) requires that the RICO person ("defendant") acquire or maintain an interest in, or control of, an enterprise through the pattern of racketeering activity. *Compagnie de Reassurance D'Ile de France v. New England Reinsurance Corp.*, 57 F.3d 56, 91-92 (1st Cir.), *cert. denied*, 516 U.S. 1109 (1995); *Lightening Lube, Inc. v. Witco Corp.*, 4 F.3d 1153, 1189-90 (3d Cir. 1993). Petitioners' Complaint fails to allege how Respondents acquired or maintained an interest in, or control of, an enterprise, through the alleged racketeering activity.

Initially, Petitioners' Complaint fails properly to allege a "nexus," *i.e.*, that Respondents maintained or acquired an interest in the enterprise. This is not surprising because as pointed out in *In re Tucker Freight Lines, Inc.*, 789 F. Supp. 884, 892 (W.D. Mich. 1991), an enterprise "logically could not maintain an interest in itself." *Id.*

Furthermore, assuming that Respondents somehow acquired or maintained an interest in the association enterprise, there is no allegation that their acquisition or maintenance of such an interest was accomplished by way of the racketeering activity. *See South Carolina Elec. & Gas Co. v. Westinghouse Elec. Corp.*, 826 F. Supp. 1549, 1562 (D.S.C. 1993) (case dismissed because Westinghouse did not acquire its interest in the enterprise as a result of the

alleged mail and wire fraud). *See also Lightening Lube, Inc., supra,* 4 F.3d at 1191 (case dismissed because Lightening Lube's pleadings failed to allege a specific nexus but only averred that Witco and Avis maintained an interest in themselves and the joint venture, and such an allegation does not explain how the interest is the result of racketeering as opposed to an interest derived from legitimate activities). Here, Petitioners do not bother to allege, because it would be illogical to do so, that Respondents acquired an interest in themselves as a result of claims payment practices. In fact, what they do allege is irrelevant to the Section 1962(b) nexus requirement: (1) that the enterprise (inexplicably) affected insureds' ability to operate motor vehicles; and (2) savings were invested in unidentified businesses engaged in or affecting interstate commerce. (*See e.g.,* Complaint, at ¶ 169.)[5]

C. Petitioners Did Not Show An Injury To Business Or Property "By Reason Of" A Violation Of § 1962(b).

The Sixth Circuit also properly concluded that Petitioners failed to state a RICO claim under Section 1962(b) because the Complaint fails utterly to allege any injury as a result of the maintenance or acquisition of an interest in an enterprise. To the contrary, it merely alleges that the supposed *predicate acts* – i.e., the "scheme to defraud" or "scheme to extort" resulted in the injury. (Complaint,

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[5] Notably, in addressing this deficiency in their application to this Court, Petitioners still have failed to refer the Court to a paragraph in their Complaint where facts are alleged to support this element of their claim. (Pet. App. pp. 23-24.)

¶¶ 171, 179.) As explained by the District Court in *Whaley*, a complaint which fails to allege an "acquisition or maintenance" injury separate and apart from the injury suffered as a result of the predicate acts of racketeering activity does not suffice under RICO:

> Contrary to plaintiff's assertion, one does not violate § 1962(b) by committing mail fraud or extortion. Instead, one must use racketeering activity to gain control or interest in an enterprise. In other words, plaintiff cannot simply allege that she was injured by the underlying acts of mail fraud and extortion. Rather, she must allege that she was injured by a violation of § 1962(b). In this case, in order to be injured by a violation of § 1962(b), plaintiff must show that her alleged injuries resulted from Auto Club having maintained an interest in itself as an enterprise.

Whaley, 891 F. Supp. at 1242.[6] *See also DeLorean v. Cork Gully*, 118 B.R. 932, 945 (E.D. Mich. 1990) (requiring an allegation that the injury flowed from the acquisition or maintenance of the enterprise in a § 1962(b) case); *Compagnie de Reassurance D'Ile de France v. New England Reinsurance Corp., supra*, 57 F.3d at 91-92 (holding that plaintiffs failed to prove any harm beyond that resulting from the fraud which constituted the predicate act under § 1962(b)).

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[6] In *Whaley*, Judge Gilmore found that because the injury alleged was economic losses occasioned by the denial of commissions, plaintiff failed to establish a compensable injury for purposes of § 1962(b) and dismissed the RICO counts. The same analysis would apply here.

Thus, the Sixth Circuit correctly affirmed the holding of the District Court that the Complaint fails because it does not allege the essential elements of a RICO claim.

CONCLUSION

This Court should deny Petitioners' Petition for Writ of Certiorari because this case does not present any compelling reason for review, and the Sixth Circuit correctly decided the case on the merits.

Respectfully submitted
on behalf of Respondents and
their individual attorneys,

DYKEMA GOSSETT PLLC

KATHLEEN MCCREE LEWIS*
*Counsel of Record
LORI M. SILSBURY
400 Renaissance Center
Detroit, MI 48243
(313) 568-6577

Barris, Sott, Denn & Driker
By: Stephen E. Glazek
Attorney for Auto Club Ins. Assoc.
211 West Fort Street, 15th Floor
Detroit MI 48226

Bodman, Longley & Dahling
By: James Albert Smith
Attorney for State Farm Mutual Automobile Insurance Company
100 Renaissance Center, 34th Floor
Detroit MI 48243-1002

Feeney, Kellett, Wienner & Bush
By: Cheryl A. Bush
Attorneys for Review Works
950 North Hunter Blvd., 3rd Floor
Bloomfield Hills MI 48304-3927

Fink, Zausmer & Kaufman
By: Mark J. Zausmer
Attorneys for Titan Insurance Company
31700 Middlebelt Road, Suite 150
Farmington Hills MI 48334

Foster Swift Collins & Smith
By: Scott L. Mandel
Attorney for Frankenmuth Mutual
313 South Washington Square
Lansing MI 48933

Garan, Lucow, Miller, Seward & Becker, P.C.
By: David N. Campos
Attorney for Allstate Insurance Company, Wolverine Mutual Insurance Company and Secura Insurance
1111 West Long Lake Road, Suite 300
Troy MI 48098

Jaffe, Raitt, Heuer & Weiss, P.C.
By: Joseph J. Shannon
Attorneys for Manageability, Inc.
One Woodward Avenue, Suite 2400
Detroit MI 48226-3412

Lambert, Leser, Cook, Schmidt & Guinta, P.C.
By: Susan M. Cook
Attorneys for Medcheck Med. Audit
309 Davidson Building
Bay City MI 48706

Morrison, Mahoney & Miller
By: Susan Tukel
Attorneys for TIG Insurance Corp. of America
900 Maccabees Center
25800 Northwestern Highway
Southfield MI 48075

Still, Neimer, Tolari & Landry, P.C.
By: David B. Landry
Attorneys for Recovery Unlimited
3700 Grand River Avenue, #300
Farmington Hills MI 48335

Wheeler & Upham, P.C.
By: Gary A. Maximiuk
Jack L. Hoffman
Attorneys for Farmers Insurance Exchange
40 Pearl, NW, 2nd Floor, Trust Building
Grand Rapids MI 49503

Willingham & Cote, P.C.
By: Raymond J. Foresman
Attorneys for Farm Bureau Insurance Co.
333 Albert Street, Suite 500
East Lansing MI 48226